



## **Office of Financial Management/Financial Services Group**

July 31, 2009

### **ALERT for Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers' Compensation** **DRAFT Language for Public Comment**

**This draft document provides additional detail regarding who/what entity is a MMSEA Section 111 Responsible Reporting Entity (RRE) for Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers' Compensation.**

If you wish to comment:

- Comments must be submitted to CMS' MMSEA Section 111 resource mailbox at: [PL110-173SEC111-comments@cms.hhs.gov](mailto:PL110-173SEC111-comments@cms.hhs.gov)
- Comments must be received by COB August 16, 2009.
- The "subject line" for your comments must include the phrase "RRE Clarifications"
- Please provide rationale with any comments you may have regarding a particular requirement.

This language below, when final, will replace the existing Section 7.1 of the NGHP User Guide regarding "Who Must report"

### **Who Must Report**

42 U.S.C. 1395y(b)(8) provides that the "applicable plan" is the RRE and defines "applicable plan" as follows:

"APPLICABLE PLAN- In this paragraph, the term 'applicable plan' means the following laws, plans, or other arrangements, including the fiduciary or administrator for such law, plan, or arrangement:

- (i) Liability insurance (including self-insurance).
- (ii) No fault insurance.
- (iii) Workers' compensation laws or plans."

As stated, you must use the applicable statutory language in conjunction with "Attachment A – Definitions and Reporting Responsibilities" to the Supporting Statement for the Paperwork Reduction Act (PRA) Notice published in the Federal Register in order to determine if you are a RRE for purposes of these new provisions. The statutory language, the PRA Notice and the PRA Supporting Statement with Attachments are all available as downloads at [www.cms.hhs.gov/MandatoryInsRep](http://www.cms.hhs.gov/MandatoryInsRep). "Attachment A -- Definitions and Reporting Responsibilities"

provides details on definitions and exactly which entities must report. Attachment A can also be found in Appendix G of this guide.

CMS is aware that the industry generally does not use the term “plan” or some other CMS definitions such as CMS’ definitions for “no-fault insurance” or “self-insurance”. However, CMS is constrained by the language of the applicable statute and CMS’ regulations. **It is critical that you understand and utilize CMS’ definitions for purposes of Section 111 when reviewing and implementing Section 111 instructions.**

### **Third Party Administrators (TPAs):**

1. Third party administrators (TPAs) as defined by CMS for purposes for 42 U.S.C. 1395y(b)(7) & (8) are never RREs for purposes of 42 U.S.C. 1395y(b)(8) [liability (including self-insurance), no-fault, and workers’ compensation reporting] **based solely upon their status as this type of TPA.** (Note that for purposes of 42 U.S.C. 1395y (b)(7) reporting for group health plan arrangements, this type of TPA is automatically an RRE.)
2. However, while entities which meet this definition of a TPA generally only act as agents for purposes of the liability insurance (including self-insurance), no-fault insurance, or workers’ compensation reporting they may, under specified circumstances, also be an RRE. See, for example, the discussion of RREs for workers’ compensation.
3. Although it may contract with a TPA or other entity for actual file submissions for reporting purposes, the RRE is limited to the “applicable plan” and may not by contract or otherwise limit its reporting responsibility. The applicable plan must either report directly or contract with the TPA or some other entity to submit data as its agent. Where an RRE uses another entity for claims processing or other purposes, it may wish to consider contracting with that entity to act as its agent for reporting purposes.
4. **Example:** Liability insurer hires a TPA to process claims. The TPA is a separate legal entity, makes payment decisions based upon the facts of each case, issues payment. The RRE is the liability insurer. The liability insurer may not shift its RRE responsibility to the TPA.

### **Corporate structure and RREs:**

1. An entity may not register as an RRE for a sibling in its corporate structure.
2. An entity may register as an RRE for itself or for any direct subsidiary in its corporate structure.
3. A parent entity may register as an RRE for any subsidiary in its corporate structure regardless of whether or not the parent would otherwise qualify as an RRE.
4. For purposes of this rule regarding corporate structure and RREs, a captive is considered a subsidiary of its parent entity and a sibling of any other subsidiary of its parent.
5. A subsidiary may not register as an RRE for its parent.
6. The general concept is that an entity may only register for another entity if that entity is below it in the direct line of the corporate structure. For example an entity may register for a direct subsidiary or the subsidiary of that subsidiary.

7. Example:

- Parent company “A” has 4 subsidiaries (S1, S2, S3, S4).
  - “A” does not meet the definition of an RRE.
  - S1, S2, S3, and S4 meet the definition of an RRE for self-insurance or otherwise.
  - S1 has a captive insurance company (S1 Captive).
  - S1 Captive meets the definition of an RRE.
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- a. Holding company “A” may register as RRE for any combination of S1, S2, S3, S4. (See #3 above.)
  - b. If the holding company registers as the RRE for S1, it may report for any of S1’s subsidiaries such as S1 Captive. (See #2 & #3.)
  - c. “A” may, but is not required to, designate S1, S2, S3, S4 or S1 Captive as its agent for reporting purposes for the subsidiaries for which it registers as an RRE. (See Section 7.2 on Use of Agents)
  - d. S1, S2, S3, S4 and S1 Captive may each register separately as RREs and designate “A” or any of its sibling subsidiaries or S1 Captive as its agent for reporting purposes. (See #2 above & Section 7.2 on Use of Agents.)
  - e. S1, S2, S3, and S4 may not register as the RRE for each other. (See #1 above.)
  - f. S2, S3, and S4 may not register as the RRE for S1 Captive. (See #4 above.)
  - g. S1 Captive may not register as the RRE for S1 (its parent) or for any of the other subsidiaries. (See # 5 & #6.)

**Deductible issues:**

1. Deductible amounts are self-insurance for MSP purposes.
2. If payment of the deductible or an amount exceeding the deductible is by a TPA:
  - a. Payment is considered to be made by the insured if the TPA is under contract to the insured/acting on behalf of the insured.
  - b. Payment is considered to be made by the insurer if the TPA is under contract to/acting on behalf of the insurer.
3. Where the insured or the insurer is the RRE for both the deductible and any amount exceeding the deductible:
  - a. The total of the deductible and any amount in excess of the deductible is used in determining whether or not any applicable reporting threshold is met.

- b. The total of the deductible and any amount in excess of the deductible are reported with a Value of “N” for “No” for Field 64 regarding Self-Insurance.
- 4. If an insured chooses to pay directly without recourse to existing insurance, any and all payment (regardless of whether or not the amount exceeds the deductible) is self-insurance and the insured is the RRE. This includes where the insured pays a claim for the deductible amount or less and fails to report that amount to its insurer in order preserve/improve its experience rating (or for some other purpose).
- 5. If the settlement, judgment, award or other payment is the deductible amount or less:
  - a. The insured is the RRE for purposes of the deductible amount if it pays the deductible to or on behalf of the injured party.
  - b. The insurer is the RRE for purposes of the deductible amount if payment of the deductible is by the insurer (with reimbursement by the insured to the insurer).
- 6. If the settlement, judgment, award or other payment exceeds the deductible:
  - a. The insured is the RRE for purposes of both the deductible amount and any amount exceeding the deductible if it pays both the deductible and any amount exceeding the deductible to or on behalf of the injured party (with reimbursement by the insurer to the insured for the amount exceeding the deductible).
  - b. The insurer is the RRE for purposes of both the deductible amount and any amount exceeding the deductible if payment of the amount exceeding the deductible is made by the insurer, regardless of whether or not the deductible amount is paid by the insured or by the insurer (with reimbursement by the insured to the insurer for the deductible).
- 7. Examples for deductible issues:
  - a. Deductible amount is \$500. Settlement is \$550. Insurer pays the claim. RRE is the insurer for both the deductible amount and the amount in excess of the deductible. (See #6b above.)
  - b. Deductible amount is \$500. Settlement is \$550. Insured pays the deductible amount of the claim to or on behalf of the injured party. Insurer pays the amount in excess of the deductible. RRE is the insurer for both the deductible amount and the amount in excess of the deductible. (See #6b above.)
  - c. Deductible amount is \$500. Settlement is \$550. Insured pays both the deductible amount and the amount in excess of the deductible (with reimbursement from the insurer). RRE is the insured for both the deductible amount and the amount in excess of the deductible. (See #6a above.)
  - d. Deductible amount is \$500. Settlement is \$450. Insurer pays the claim. RRE is the insurer. (See #5b above.)
  - e. Deductible amount is \$500. Settlement is \$450. Insured pays the claim. RRE is the insured. (See #5a above.)

- f. Deductible amount is \$500. Settlement is \$450. TPA under contract to the insured pays the claim. RRE is the insured. (See #2a & #5a above.)
- g. Deductible amount is \$500. Settlement is \$450. TPA under contract to the insurer pays the claim (seeking reimbursement from the insured). RRE is the insurer. (See #2b & #5b.)
- h. Deductible is \$500. Settlement is \$450. Insurance contract calls for the insurer to pay the deductible (and any amount in excess of the deductible, if applicable), with insurer seeking reimbursement of deductible amounts paid from the insured. For a specific claim, insured makes payment without recourse to its insurance. RRE is the Insured. (See #4 above.)
- i. Deductible is \$500. Settlement is \$550. Insured pays the claim without reporting the claim to its insurer (in essence, without recourse to its insurance). RRE is the insured. (See #4 above.)

### **Fronting Policies:**

The intent with “fronting” policies is that the insurer will never pay a claim. The expectation of both the insured and the insurer is that the insured will pay all claims. Where the insured does pay the claim, the insured is the RRE.

### **Re-insurance, Stop Loss Insurance, Excess Insurance, Umbrella Insurance etc.:**

For re-insurance, stop loss insurance, excess insurance, umbrella insurance, guaranty funds, patient compensation funds, etc. which have responsibility beyond a certain limit, the key in determining whether or not reporting for 42 U.S.C. 1395y(b)(8) is required for these situations is whether or not the payment is to the injured claimant/representative of the injured claimant vs. payment to the self-insured entity to reimburse the self-insured entity. Where payment is being made to reimburse the self-insured entity, the self-insured entity is the RRE for purposes a settlement, judgment, award or other payment to or on behalf of the injured party and no reporting is required by the insurer reimbursing the self-insured entity.

### **Multiple Defendants:**

Where there are multiple defendants involved in a settlement, an agreement to have one of the defendant’s insurers issue any payment in obligation of a settlement, judgment, award or other does not shift RRE responsibility to the entity issuing the payment. All RREs involved in the settlement remain responsible for their own reporting.

### **Self-Insurance Pools:**

1. RRE for liability self-insurance pools -- Entities self-insured in whole or in part with respect to liability may elect, where permitted by law, to join with other similarly situated entities in a self-insurance pool (e.g., joint powers authority).
2. If all three of the characteristics below are met, the RRE is the self-insurance pool:
  - a. The self-insurance pool is a separate legal entity.
  - b. The self-insurance pool has full responsibility to resolve and pay claims using pool funds.
  - c. The self-insurance pool resolves and pays claims without involvement of the participating self-insured entity.

(When a self-insured entity in the self-insurance pool has the authority to approve/disapprove payment of claims and/or negotiated resolutions, the self-insurance pool is not the RRE, the individual self-insured members are the RREs. In this situation, each of the members would have the option of using the self-insured pool (or another entity) as its agent for purposes of Section 111 reporting.)

Unless all three of the above characteristics apply to the self-insurance pool, the participating self-insured entity is the RRE.

3. Example: A self-insurance pool meets the characteristics in #2 a-c above for some members of the pool but not for others. The self-insurance pool provides administrative services only (ASO) for certain members. The RRE is the self-insurance pool only for those members for which it meets the characteristics in #2 a-c above. Each member who receives ASO from the self-insurance pool is a separate RRE for its settlements, judgment, awards, or other payments. The self-insurance pool is not the RRE for the ASO members.

**RRE for a State established “assigned claims fund” which provides benefits for individuals injured in an automobile accident that do not qualify for personal injury protection/medical payments protection from an automobile insurance carrier:**

1. Where there is a State agency which resolves and pays the claims using State funds or funds obtained from others for this purpose, the established agency is the RRE.
2. Where there is a State agency which designates an authorized insurance carrier to resolve and pay the claims using State-provided funds without State agency review and/or approval, the designated carrier is the RRE.
3. Where there is a State agency which designates an authorized insurance carrier to resolve and pay the claims using State-provided funds but the State agency retains review or approval authority, the State agency is the RRE.
4. Example:
  - State agency
  - The State agency pays no-fault claims using a State fund which is not under the agency’s control.

- The State agency designates an insurance carrier to resolve liability insurance claims, but the State agency retains payment responsibility.

The state agency is the RRE for both the liability insurance and the no-fault insurance. It may report both types of insurance under a single RRE ID # or obtain a separate RRE ID # for each type of insurance.

## **Workers' Compensation:**

1. Attachment A – “Definitions and Reporting Responsibilities” for the Revised Supporting Statement to the Paperwork Reduction Act Notice published in the Federal Register on February 12, 2009” provides, in part: *“For purposes of the reporting requirements at 42 U.S.C. 1395y(b)(8), a workers’ compensation law or plan means a law or program administered by a State (defined to include commonwealths, territories and possessions of the United States) or the United States to provide compensation to workers for work-related injuries and/or illnesses. The term includes a similar compensation plan established by an employer that is funded by such employer directly or indirectly through an insurer to provide compensation to a worker of such employer for a work-related injury or illness. Where such a plan is directly funded by the employer, the employer has the responsibility for the reporting requirements at 42 U.S.C. 1395y(b)(8). Where such a plan is indirectly funded by the employer, the insurer has the responsibility for the reporting requirements at 42 U.S.C. 1395y(b)(8).”*
2. The following provides more specific guidance regarding who is the RRE for workers’ compensation laws or plans.
  - a. Where the applicable law or plan authorizes an employer to purchase insurance from an insurance carrier and the employer does so, the insurance carrier is the RRE.
  - b. Where the applicable law or plan authorizes an employer to self-insure and the employer does so independently of other employers, the self-insuring employer is the RRE.
  - c. Where the applicable law or plan authorizes employers to join with other employers in self-insurance pools (e.g., joint powers authorities) and the self-insurance pool (1) is a separate legal entity (2) with full responsibility to resolve and pay claims using pool funds (3) without involvement of the participating employer, the self-insurance pool is the RRE. All three of these criteria must be met for the self-insurance pool to be the RRE.
  - d. Where the applicable law or plan authorizes employers to join with other employers in self-insurance pools but any of the above delineated requirements are not satisfied, the participating employer is the RRE.
  - e. Where the applicable law or plan establishes a State/Federal agency with sole responsibility to resolve and pay claims, the established agency is the RRE.
  - f. In situations where the applicable law or plan authorizes employers to self-insure or to purchase insurance from an insurance carrier and also establishes a State/Federal agency to assume responsibility for situations where the employer fails to obtain insurance or to properly self-insure –

- 1) Where such State/Federal agency itself resolves and pays the claims using State/Federal funds or funds obtained from others for this purpose, the established agency is the RRE.
- 2) Where such State/Federal agency designates an authorized insurance carrier to resolve and pay the claim using State/Federal-provided funds without State/Federal agency review and/or approval, the designated carrier is the RRE.
- 3) Where such State/Federal agency designates an authorized insurance carrier to resolve and pay the claim using State/Federal-provided funds but State/Federal agency retains review or approval authority, the State/Federal agency is the RRE.

### **Liquidation:**

1. To the extent that settlement, judgment, award, or other payment obligations are paid to or on behalf of the injured party, from the assets of the entity in liquidation, the entity in liquidation is the RRE.
2. To the extent that a portion of a settlement, judgment, award or other payment obligation against an entity in liquidation is paid to or on behalf of the injured party by another entity from that other entity's assets (for example, payment by a state guarantee fund), the entity that makes the payment is the RRE.
3. To the extent that a payment does not fully satisfy the entity in liquidation's debt to the injured party, the amount reported is the amount paid. Any subsequently approved interim or final payments would be handled in the same manner. That is, they would be reported as additional TPOC amounts.

### **Bankruptcy:**

Where an RRE is bankrupt, it remains the RRE to the extent that settlements, judgments, awards or other payments are paid to or on behalf of the injured party after approval by a bankruptcy court.

### **Multi-National Organizations, Foreign nations, American Indian, Alaskan Native Tribes:**

Liability insurance (including self-insurance), no-fault insurance and workers compensation plans associated with multi-national organizations, foreign nations, American Indian and Alaskan Native tribes are subject to the MSP provisions and must be reported accordingly.